INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Treaties and Agreements Involved	3
Statement of the Case	3
Reasons for Granting the Writ	11
Conclusion	20

CITATIONS

Cases:

Atchison, T. & S.F. Ry. Co. v. *U.S.*, 231 F. Supp. 422 (1964); Affirming *Brazos River Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963) 7, 11

Boston and Maine RR v. *U.S.*, 202 F. Supp. 830 (1962), Aff'd. by an equally divided Court, 373 U.S. 372 (1963), Reh. Den. 374 U.S. 859 ..... 7, 11

Burlington Truck Lines v. *U.S.*, 371 U.S. 156 (1962) .. 17

Campagnie Generale Transatlantique v. *American Tobacco Co.*, 31 F.2d 663 (2d Cir. 1929), Cert. Den. 280 U.S. 555 (1929) 18

FPC v. *Hope Nat. Gas*, 320 U.S. 591 602 (1944) 16

Flying Tiger Line, Inc. v. *C.A.B.*, 350 F.2d 462, 46 (1965) 13

Hillsborough County Port Authority v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961), Affd. per curiam sub nom. *Alabama T. & N.P. Co.* v. *U.S.*, 207 F. Supp. 638 (1962) 7, 11

National Air Carrier Ass'n v. *C.A.B.*, 141 U.S. App. D.C. 31, 436 F.2d 185, 186 (1970) 3

New York v. *U.S.*, 331 U.S. 284 (1947) 15

Page

Nueces County Navigation Dist., No. 1 v. *Atchison, T. & S.F. Ry.*, 325 I.C.C. 400 (1965), Affd. sub nom. *City of Galveston* v. *U.S.*, 257 F. Supp. 243 (1966), Affd. Mem. 386 U.S. 269 (1967) 7, 11
Pacific Far East Line v. *U.S.*, 246 F.2d 71 (D.C. Cir. 1957) 18
Pacific Service Rate Case, 24 CAB 629 (1957), Affd. sub nom. *Pan Am* v. *CAB*, 256 F.2d 711 (C.A.D.C. 1958), Cert. Den. 358 U.S. 836 (1958) 12
Stockton Port District v. *Pacific Westbound Conf.*, 9 FMC 12 (1965), Affd. 369 F.2d 380 (1966) 18
U.S. v. *Ill. Cent. Rwy.*, 263 U.S. 515 (1924) 12

ADMINISTRATIVE DECISIONS:

Arkansas Plant Food Co. v. *St. Louis So. Western Rwy. Co.*, 315 I.C.C. 680 (1962) 15
Republic of France v. *Director General*, 68 I.C.C. 422 (1922) 15
Spreckels Savage Tire Co. v. *A.T. & S.F. Ry. Co.*, 142 I.C.C. 507 (1928) 15
CAB Order 74-8-54 dated August 13, 1974 .....8, 15
CAB Order 74-1-130 dated January 29, 1974 14
CAB Order 73-12-77 dated December 19, 1973 .....8, 14
Theodore Manufacturing, Co., Order No. E 22710, dated September 30, 1965 14

STATUTES, TREATIES AND AGREEMENTS:

Federal Aviation Act of 1958, 49 U.S.C. 1301, et seq:
Section 102(c), 49 U.S.C. 1302(c) 3
Section 402, 49 U.S.C. 1372 3
Section 404(b), 49 U.S.C. 1374(b) 2, 3, 5
Section 412, 49 U.S.C. 1382 3
Section 414, 49 U.S.C. 1384 3
Section 1002(f), 49 U.S.C. 1482(f) 3, 6, 17, 18
Section 1002(f), 49 U.S.C. 1482(j) 18
Interstate Commerce Act, Section 3(1), 49 U.S.C. 3(1) 3, 6
Shipping Act of 1916, Section 16 First, 46 U.S.C. 815 First 3, 6, 17
Convention on International Civil Aviation, 61 Stat. 1180 (1947) Article 6 .....3, 18
Bermuda Agreement, 60 Stat. 1499, TIA 5253 (1946), Article 2(2) 3, 18

Page

MISCELLANEOUS:

29 Fed. Reg. 3783 (1964) No. 1174 FMC, July 17, 1964 15
Leonard S. Goodman, Assoc. Gen. Counsel, Interstate Commerce Commission, *Recent Trends in Transport Regulation.* 70 Mich. L. Rev. 1223, 1249 (1972) 12
Note: Rate Regulation in Ocean Shipping, "78 HLR 635 (1965) 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No.

THE COMMONWEALTH OF VIRGINIA, *Petitioner,*

v.

THE CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, The Commonwealth of Virginia * (Virginia), respectfully prays that the Court issue a writ of certiorari to review the Judgment and opinion of the Court of Appeals for the Fourth Circuit entered in this proceeding on June 6, 1974 in which that court affirmed orders of the Civil Aeronautics Board.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The orders of the Civil Aeronautics Board appealed from are No. 73-2-24, dated February 6, 1973; 73-7-9, dated July 5, 1973 and also appear in the appendix.

---

* The petition is joined in by the intervenor below, the Metropolitan Washington Board of Trade.

JURISDICTION

The judgment of the United States Court of Appeals was entered June 6, 1974, affirming the orders of the Civil Aeronautics Board dated February 6, 1973 and July 5, 1973.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(i).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board (Board), having found that the existing Transatlantic cargo rate structure unduly preferred New York and prejudiced Washington (Dulles International Airport) in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. 1374(b), should have removed the unlawful preference and prejudice and protected the competitive interests of ports and shippers by equalizing the rates at those competing ports?

2. If the Board rejects the remedy of equalizing rates at competitive ports, and bases the remedial rates on a formula based on the miles of transportation received, does this remove the unlawful preference and prejudice when New York shippers continue to receive the same or more miles of air service as Dulles shippers, but pay a lesser charge?

3. Having found that the cargo rates are unlawfully preferential and prejudicial may the Board justify its failure to remedy the unlawful preference and prejudice as required by statute on the ground that the moving cause of the discrimination against United States ports and shippers is the insistance of foreign governments?

STATUTES, TREATIES AND AGREEMENTS INVOLVED

Federal Aviation Act of 1958, Sections 102(c) (49 U.S.C. 1302(c)), 402 (49 U.S.C. 1372), 404(b) (49 U.S.C. 1374(b)), 412 (49 U.S.C. 1382), 414 (49 U.S.C. 1384) and 1002(f) (49 U.S.C. 1482(f)).

Interstate Commerce Act, Sections 3(1), 49 U.S.C. 3(1)

Shipping Act of 1916, Section 16 First, 46 U.S.C. 815 First

Convention on International Civil Aviation, 61 Stat. 180 (1947) Article 6.

Bermuda Agreement, 60 Stat. 1499, TIA 5253 (1946), Article 2(2).

The above are set forth in the Appendix.

STATEMENT OF THE CASE

This proceeding arose out of an investigation conducted by the Civil Aeronautics Board (CAB) between 1969 and early 1973 to determine whether the transatlantic air cargo rates unduly preferred New York and unduly prejudiced competing gateways, particularly Washington (Dulles International Airport).

International air fares and rates are generally established by agreement among the carriers through the International Air Transport Association (IATA) as described by the District of Columbia Circuit in *National Air Carrier Ass'n* v. *C.A.B.*, 141 U.S. App. D.C. 31, 436 F.2d 185, 186 (1970):

> The International Air Transport Association (IATA) is a trade organization of domestic and foreign air carriers which are engaged in scheduled international air transportation. The member carriers periodically meet in 'traffic conferences'

to take joint action on matters of mutual concern, including types of fares offered to the public. These agreements, which take the form of resolutions, are subject to approval by the parent nations of the member carriers; in this country, the Civil Aeronautics Board has long asserted jurisdiction over IATA resolutions under Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382 (1964). See generally IATA Traffic Conference Resolution, 6 C.A.B. 699 (1946). The Board's approval of an IATA resolution confers antitrust immunity by virtue of Section 414 of the Act, 49 U.S.C. § 1384 (1964). The rates contemplated by the agreements are then embodied in tariffs which are filed with the Board pursuant to 49 U.S.C. § 1373 (1964).

Under this procedure common rates for air cargo between competitive ports are widely accepted. For instance, New York's rates to European Ports are the same as Montreal's rates to the same destination although as aircraft operate across the Atlantic, New York is about 200 miles farther from European points than is Montreal (Bds. Op. App. p. 91a). Many cargo rates between New York and Copenhagen, Frankfurt, Geneva, Milan and Rome are common rated, although Rome is 400 miles farther from New York than Copenhagen. Similarly, New York's rates to Central and South American ports are common rated with Dulles, favoring New York which is approximately 200 miles farther than Dulles from some of those points. Cargo rates from Los Angeles to Tokyo and Far Eastern Ports are common rated with Seattle to the same points although Los Angeles is approximately 957 miles farther from these points.[1]

---

[1] International Air Traffic Tariffs Corporation Agent, C.A.B. 259, October 1, 1973.

During the investigation of the instant transatlantic IATA cargo rates, the Administrative Law Judge found that the transatlantic air cargo rate structure is unduly preferential to New York and unduly prejudicial to Dulles in violation of Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1374(b)). (app. 136-7)

The CAB summarized the Judge's findings as follows:

> Judge Cusick found that the North Atlantic cargo rate structure unduly prefers New York and unduly prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago. These findings were based on the following facts. First, for almost every SCR* and at most weight breaks, *the rate per mile for New York Shipments is generally lower* than the equivalent rate per mile available for shipments to or from any of the other cities. Second, *A substantial volume of North Atlantic cargo moves to New York* from all over the United States via truck, apparently for reasons of price expediency. Third, a widespread system of common-rating exists on the European side of the Atlantic, and this practice adversely affects U.S. *shippers outside of New York who are required to pay more than New York area shippers to transport similar items shorter distances.* Finally, for those European cities beyond London for which add-ons exist, *the amounts of such add-ons are substantially less than the add-ons that exist in this country* for similar distances beyond New York. Judge Cusick concluded that the rate structure has increased New York's predominance as a gateway for cargo shipments to Europe beyond what it might otherwise be, and

---

* Specific Commodity Rate.

has depressed the utilization of other U.S. gateways below what would be expected from the cargo potential available and the quality of those facilities. Upon a review of the record, we find that we agree with these conclusions.[2] (Emphasis added)

The Board agreed with the Administrative Law Judge that the preference for New York and prejudice to Dulles was undue and unlawful. "None of the parties contest the correctness nor the lawfulness of this conclusion." (Court Op. app. 4a)

The controversy in the case relates to the method selected to remove the preference and prejudice as directed by Section 1002(f) of the Federal Aviation Act (49 U.S.C. 1482(f)). The Administrative Law Judge ruled that the rates between the competing U.S. gateway cities on the East Coast (Boston, New York, Philadelphia, Baltimore and Washington) and Europe should be common rated. The Board, however, rejected this remedy and prescribed instead a formula by which the New York-European point rate per mile is multiplied by the mileage between the U.S. gateways, such as Dulles, and the point in Europe.

The Board's decision was appealed to the Court of Appeals for the Fourth Circuit pursuant to 49 U.S.C. 1486, and the Court affirmed the Board's decision.

The court and the Board rejected the contention by Petitioners below that decisions by administrative agencies and the courts under identical statutes in rail and ocean transportation, 49 U.S.C. 3(1); and 46

---

[2] CAB Order No. 73-2-24, App. p. 93a.

U.S.C. 815 First, required that Dulles and New York, as competitive ports, be common rated. Petitioners relied on *Boston and Maine RR* v. *U.S.*, 202 F. *Supp.* 830 (1962), Affd. by an equally divided Court, 373 U.S. 372 (1963), Reh. Den. 374 U.S. 859; *Atchison, T & SF Ry. Co.* v. *U.S.*, 231 F. *Supp.* 422 (1964); Affirming *Brazos River Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); *Nueces County Navigation Dist., No. 1* v. *Atchison, T. & S.F. Ry.*, 325 ICC 400 (1965), *Affd. sub nom. City of Galveston* v. *U.S.*, 257 *F. Supp.* 243 (1966), Affd. Mem. 386 U.S. 269 (1967); *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961), Affd. *per curiam sub nom. Alabama T. & N.P. Co.* v. *U.S.*, 207 F. *Supp.* 638 (1962).

The Court's rational was that (1) Major costs of air transportation tend to vary with miles flown more than is true in surface transport and (2) the CAB has broader discretion than the I.C.C. to require that differences in distances be reflected in differences in rates and (3) if Dulles were common rated with New York on rates to Europe, New York would be denied the natural (and economic) advantages of its geographic location. (App. pp. 8a, 10a.)

The court also rejected the contention that to refuse to common rate Dulles with New York was inconsistent with widespread practice in air transportation since *all the rates under investigation* were and are common rated between New York and Montreal although New York is 200 miles farther from Europe. All the transatlantic rates were common rated between some points in Europe. All the rates across the Pacific are common rated between two or more cities on the West Coast; and even to Central and So. America, New York is common rated with Dulles, even though Dulles

has a distance advantage to some cities of 200 miles.[3] By these common rates Dulles has been denied the natural and Economic advantage of its geographic proximity to Central and South American ports.

The Court supported its position by stating:

> Nearly all domestic rates and fares reflect distance and among domestic points common-rating is rare.[4] The majority of rates for international transportation is not common-rated. (App. p. 9a.)

The Court did recognize that some air transport rates were common rated, but justified those ". . . because of the need for cooperation and agreement among nations engaged in air transportation", (App. p. 9a) and because "There is common-rating of points in Europe, usually at the instance of European governments, and this is a matter beyond the regulation or control of the Board."[5] (App. p. 9a.)

Although the Court approved the Board's "mileage based" formula, it recognized that the formula did not

---

[3] Since the Board's decision in this proceeding it has reaffirmed air cargo rates across the Pacific which equalize rates between Los Angeles and points in the Far East with the rates of Seattle to Tokyo although Los Angeles is over 900 miles farther from the oriental point than is Seattle. CAB Order 73-12-77 dated December 19, 1973. The CAB has also stayed the effect of the challenged orders to allow more cities in Europe to be common rated to U.S. points than would be allowed by application of its formula. CAB Order 74-8-54 dated August 13, 1974.

[4] Domestic air cargo rates had not been discussed by the Board in its decisions. The Board's counsel had used this reasoning in its brief to the Court.

[5] The Record does not contain objections by foreign governments to common rating nor did the Board make such findings. Such rationalizations were made by Board counsel on brief to the Court. See Brief of the Board to the Court below, pp. 42, 43, 44 and 45.

give Dulles shippers as much transport mileage as New York shippers

> Virginia points out that N.Y. shippers get 4,004 miles of air transportation to Milan, Italy, for 78 centers per pound; but for 3,646 miles of air transportation to London—almost 400 miles less—Dulles shippers are charged 79 cents per pound.[6]

The fact is that the new rates are lower for New York shippers than for Dulles shippers *in every mileage category;* see Table I, yet the court held that this difference in rate per mile did not constitute an unlawful preference for New York because:

> . . . The fact is that to any *particular* European city the mileage rate from New York or any other United States gateway city is precisely the same, and, hence, there is neither preference to New York nor discrimination against the other United States gateway cities. (Op. p. 16)

---

[6] The court cited this example at Page App. 12a of the Memo opinion. The disparity is even more pronounced as relates to Rome. The rate $.95 per lb. applies to New York-Rome (4,280 miles). The Dulles Rate to Rome, for 3,646 miles is $.96 per lb. So the New York shipper gets more than 600 miles more transport than the Dulles shipper, and pays less. The rate disparities have been increased since the original Order in February of 1973, by amendments which approve disparities on the sole basis of origin of the traffic. The American shipper is charged a higher rate for service to a European port, than the European shipper at that port is charged for service to the U.S. For identical mileage, the U.S. shipper must pay more.

TABLE I

RATES DIFFER FOR COMPARABLE MILEAGE

GENERAL COMMODITY 220 POUND CAB PRESCRIBED RATES

Mileage Block	Dulles/ Balt/Wash	New York	Chicago	Cleveland	Detroit	Philadelphia
3200-3299	Shannon	Glasgow				Dublin
Miles [1]	3270	3207				3290
220 lb Rate [2]	92	91				90
3400-3499	Glasgow	London		Glasgow	Shannon	Lisbon
Miles [1]	3402	3456		3479	3477	3455
220 lb. Rate [2]	96	91		99	89	93
3600-3699	London	Brussels	Shannon		Edinburgh	Madrid
Miles [1]	3646	3662	3621		3621	3677
220 lb. Rate [2]	96	93	101		94	95
3800-3899	Oslo	Hamburg			Lisbon	Hamburg
Miles [1]	3866	3801			3807	3895
220 lb. Rate [2]	103	95			93	97
4000-4099	Bergen	Munich	Lisbon	Oslo	Madrid	Berlin
Miles [1]	4061	4030	4001	4087	4054	4058
220 lb. Rate [2]	103	96	106	105	96	98
4200-4299	Munich	Rome	Dusseldorf	Bergen	Malmo	
Miles [1]	4227	4280	4220	4275	4225	
220 lb. Rate [2]	101	95	106	105	98	

[1] IATA shortest operated mileage

[2] CAB prescribed rates rounded to nearest cent

SOURCE: IATA Mileage Manual, Air Tariff Corporation CAB 26 and CAB prescribed rate formula.

The Court's decision was issued on June 6, 1974 and this petition is filed on September 4, 1974.

REASONS FOR GRANTING THE WRIT

1. THE REFUSAL TO COMMON RATE THE TRANSATLANTIC AIR CARGO RATES AT DULLES WITH THOSE AT NEW YORK IS THE FIRST JUDICIAL INTERPRETATION OF THIS SECTION OF THE FEDERAL AVIATION ACT AND IS IN CONFLICT WITH ITS PURPOSE.

The decision of the Court below conflicts with the decision of this court in *Boston & Maine Railroad* v. *U.S.*, 373 U.S. 372 (1963), decided by an equally divided court, Reh. Den. 374 U.S. 859, which approved the decision in *Boston and Maine Railroad* v. *U.S.*, 202 F. Supp. 830 (1962). That case required the rates between competing ports to be common rated to protect the competitive opportunities of East Coast ports for transatlantic shipments. The policy and purpose of the anti-discrimination statute and the 1935 amendment was stated by the lower court to be:

> One of the purposes of the 1935 amendment to Section 3 was, as the Commission had previously pointed out, *Equalization of Rates, (At North Atlantic Ports,* 311 ICC 689 (1959)), *supra.* at 716 and cities therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious. (*Id.* at 837)

Moreover, other decisions [7] of the 1960's overwhelm-

---

[7] *Atchison, T. &S.F. Ry. Co.* v. *U.S.*, 231 F. Supp., 422 (1964); affirming *Brazos River Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); *Nueces County Navigation Dist., No. 1* v. *Atchison,* T.&S.F. Ry., 325 I.C.C. 400 (1965), *Affd. sub nom. City of Galveston* v. *U.S.*, 257 F. Supp. 243 (1966), Affd. Mem. 386 U.S. 269 (1967); *Hillsborough County Port Authority* v. *Annapee & W. Ry.*, 313 I.C.C. 691 (1961), Affd. *per curiam sub nom. Alabama T. & N.P. Co.* v. *U.S.*, 207 F. Supp. 638 (1962).

ingly establish the principle that export and import rates strictly tailored to transportation costs are not permissible under the existing law if they unduly restrict port competition.[8] The factor of distance, and hence costs, is but one of several factors to be considered, as both the Commission and the courts indicated.[9]

The court cites decisions by this court [10] and the Interstate Commerce Commission [11] in support of the view that the anti-discrimination provisions were not intended "to deprive a locality of the natural advantages of its geographic location." (App. 10a). The decisions of this court cited were not "port" cases. In spite of that, *U.S.* v. *Illinois Cent. Ry.*, 263 U.S. 515 (1924), approved equal rates for competitive points. In any event, the decisions protecting geographic proximity do not support the decision in this case where the rates approved favor New York when New York has

---

[8] The Board has prescribed equal rates for two U.S. ports for the International Carriage of mail. Between San Francisco and Seattle and Tokyo, the rates were equalized although one carrier's operation involved 1500 more miles of air transport service, on the ground that carrier costs are not the sole determinant of rates. *Pacific Service Rate Case*, 24 CAB 629 (1957), Affd. *sub nom. Pan Am.* v. *CAB*, 256 F. 2d 711 (C.A.D.C. 1958), *Cert. Den.* 358 U.S. 836 (1958).

[9] Leonard S. Goodman, Assoc. Gen. Counsel, Interstate Commerce Commission, *Recent Trends in Transport Regulation.* 70 Mich. L. Rev. 1223, 1249 (1972).

[10] *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924); *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216 (1951).

[11] *Board of Trade* v. *Ill. Cent. R. Co.*, 344 I.C.C. 818 (1973); *Canaveral Port Authority* v. *Ahnapee & W. Ry. Co.*, 337 I.C.C. 681 (1970); *Maritime Association, Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 537 (1925).

geographic advantages with respect to Europe, but again favor New York when Dulles has the geographic advantages with respect to Central and South America.

The court and the Board's focus on the costs of the carriers, misapprehended the purpose of the anti-discrimination statutes. (Op. App. 8a, 10a) The protection sought was not for carriers, but for shippers. The decision clearly conflicts in principle with that of other circuits that Section 404(b) protects *shippers,* and not carriers: The D.C. Circuit has stated, "That section (Sec. 404(b)) exists to protect *shippers,* not carriers. Cf. *I.C.C.* v. *B & O Rwy.,* 145 U.S. 263, 281 (1892)". *Flying Tiger Line, Inc.* v. *C.A.B.,* 350 F.2d 462, 465 (1965) (Emphasis in original)

This court should review the application of Sec. 404(b) to air transportation of cargo to provide the necessary guidance as to whether the congressional intent to protect ports and shippers is carried out.

2. THE FORMULA APPROVED FOR REMOVING THE PREFERENCE FOR NEW YORK AND FOR PREJUDICE TO DULLES, BASED ON A PURPORTED "MILES OF SERVICE" PRINCIPLE, SHOULD NOT APPLY TO PORT CITIES, IS INCONSISTENT WITH THE BASIC PRINCIPLES OF SPECIFIC COMMODITY RATE MAKING AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The court below held that the unlawful preference for New York and prejudice to Washington-Baltimore was removed by the new rates because they were based on "mileage" (the miles of service performed). (App. p. 8a) This conflicts with the principle generally applicable to port cities, and the practices of the carriers and the Board in international rate making. In transatlantic cargo transportation 65 per cent to 80 per cent of the movement is under specific commodity rates.

The carriers themselves do not even list distance as a factor in determining the level of these rates. (Exh. No. PA-9 p. 6) The Board has ruled that distance is only one of many factors in determining specific commodity rates. *Theodore Manufacturing Co.*, Order No. E 22710, dated September 30, 1965. See Pacific Service Rate case, 24 CAB 629, *supra*, footnote 8, where the Board refused to apply distance as the determining factor in mail rates.

The decision of the court below not only approves the Board's novel mileage formula, but appears to disapprove further common rating by the Board which would deprive any ports of ". . . the economic advantage of their geographic locations." (Op. App. p. 10a) The Board continues to approve common rating between far eastern points such as Tokyo and Seattle and Los Angeles although Los Angeles is more than 900 miles farther from Tokyo than is Seattle (Order No. 73-12-77 dated December 19, 1973) and also continues to common rate New York with Dulles to So. American ports when Dulles has an approximate 200 mile advantage (Order No. 74-1-130 dated January 29, 1974).) By these decisions the Board denies ports the advantage of geographic location.

The so-called "mileage" formula prescribed is not even what it purports to be. The rates give New York shippers more miles of service for the same or lower rates than Dulles shippers. At App. p. 12a of its Opinion the Court states:

> Virginia points out that New York shippers get 4,004 miles of air transportation to Milan, Italy, for 78 cents per pound; but for 3,646 miles of air transportation to London—almost 400 miles less—

Dulles airport shippers must pay 79 cents per pound.[12]

Such a result is contrary to and in conflict with the decision by this court in *New York* v. *U.S.*, 331 U.S. 284 (1947). That case unambiguously held that the charge of a higher rate to one shipper than another for an equal number of miles of transportation constitutes discrimination. When shippers at cities in the Southern Region were charged higher rates than shippers in cities in official territory for equal mileage, discrimination was established. *Id.* at 302-303.

That case did not involve port rates, but rather rates between domestic points. The decision is relevant here because the Board and the court relied extensivly, if not exclusively, on "miles flown" as the criterion for

---

[12] Since its original order in this proceeding the Board has amended its order to approve a lower rate for shipments originating in Europe to a U.S. point than is charged a U.S. shipper to the same European point in the opposite direction. For identical mileage, the American shipper must pay a higher charge—a rate disparity based solely on point of origin. (Order 74-8-54 dated August 13, 1974.)

This disparity was not argued before the Court below. The courts reasoning was that, as long as the mileage rate between New York and any *Particular* European city is precisely the same as the Dulles mileage rate, there is no preference for New York and discrimination against Dulles. This reasoning would also support a directional disparity. This view conflicts with all decisions found by Counsel. *Arkansas Plant Food Co.* v. *St. Louis So. Western Rwy. Co.*, 315 I.C.C. 680 (1962); *Republic of France* v. *Director General*, 68 I.C.C. 422 (1922); *Spreckles Savage Tire Co.* v. *A.T.&S.F. Ry. Co.*, 142 I.C.C. 507 (1928). In ocean transport, when the Maritime Commission initiated formal investigations on directional disparities, the carriers eliminated the disparities. 29 FED. REG. 3783 (1964) No. 1174 FMC, July 17, 1964. See "Rate Regulation In Ocean Shipping". 78 HLR 635, 644 (1965).

determining a proper rate relationship. Having resolved miles of service to be the determining factor of what the rate relationship should be, the Board should not in the same decision approve rates which *in every mileage bracket* (see Table I) give New York shippers more miles of air transport service for the same or a lesser rate than is charged the Dulles shippers.

It is contended that in order to provide the equal competitive opportunity provided by law, Dulles must be common rated with New York. If, however, the relation of the rates is based on miles of service such "mileage formula" should relate the rates to the miles performed in fact as well as in formula.[13] Dulles' rates should be lower where its location gives it shorter mileage. The present rates deny Dulles any competitive opportunity at all. They favor New York when it is nearer the foreign port and they favor New York when it is farther away.

3. THE COURT BELOW MISAPPREHENDED THE DISTINCTION BETWEEN THE LACK OF POWER TO PRESCRIBE RATES IN FOREIGN AIR TRANSPORTATION AND THE GRANT OF POWER TO REMOVE UNDUE PREFERENCE OR PREJUDICE IN FOREIGN RATES.

The decision involves important questions of first impression concerning the extent to which discrimination against American ports and shippers must be accepted on the ground that the American government must accommodate foreign interests.

The court justified the acceptance of rates granting New York shippers more miles of air transport serv-

[13] It is not theory but the impact of the rate ordered which counts. *FPC* v. *Hope Nat. Gas*, 320 U.S. 591, 602 (1944).

ice than the mileage given Dulles shippers for the same rate as follows:

> There is common-rating of points in Europe, usually at the instance of European governments, and this is a matter beyond the regulation or control of the Board.[14] (Op. App. p. 12a)

> "The Board has, nevertheless given approval to some international common-rating, but it has done so . . . because of the need for cooperation and agreement among nations . . ." (*Id.* App. p. 9a)

Common rating is not merely an internal European matter though. The rates are between European ports and U.S. ports. European governments insist on equal rates to the U.S. to prevent concentration of the cargo traffic in one European port[15] and to equalize competitive opportunities for the respective ports.

Congress has recognized that *levels* of international rates could be established only by cooperative action between sovereign states. For this reason Congress withheld the power to establish rates in both the Shipping Act of 1916 (46 U.S.C. 801, 815 First 1959) and in the Federal Aviation Act of 1958 (49 U.S.C. 1301, 1482(f)). Yet, in both Acts, Congress directed the

---

[14] It should be noted that the record in this case contains *no objections by foreign governments* to equalize rates between Dulles and New York. Such a rational was presented by attorneys for the Board at pp. 42, 43, 44, 45 and 57 of their brief to the Court of Appeals. The Court's reliance on rational of counsel conflicts with the decision of this Court in *Burlington Truck Lines* v. *U.S.*, 371 156 (1962).

[15] The record before the CAB indicated that on the European side, no more than 29 percent of the transatlantic export-import traffic moved through one city, whereas in the U.S., more than 80 percent moved through New York.

agencies to prevent discrimination against American Ports and Shippers. See 46 U.S.C. 815 First (1959), and 49 U.S.C. Section 1482(f). It reaffirmed this posture as recently as 1972 by increasing the powers of the Board in international rate matters (P.L. 92-259, Sec. 3(a), 86 Stat. 96, March 22, 1972, 47 U.S.C. 1482(j).

The view that the Board is limited in its power to enforce American law prohibiting discrimination misapprehends the statute and conflicts with decisions by other circuits under Sec. 16, First of the Shipping Act of 1916, 39 Stat. 734 (46 U.S.C. Sec. 815 First). *Campagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663 (2d Cir. 1929), *cert. den.* 280 U.S. 555 (1929); *Stockton Port District* v. *Pacific Westbound Conf.*, 9 FMC 12 (1965), affd. 369 F.2d 380 (1966); *Pacific Far East Line* v. *U.S.*, 246 F.2d 71 (D.C. Cir. 1957).

The view that the Board must accept discrimination against U.S. ports and shippers would render meaningless the commitments by foreign governments in treaties [16] and executive agreements [17] to abide by the laws of the countries into which their carriers fly. Substantial questions of first impression are raised as to the construction and application of the Acts regulating air transportation, supported by treaties and executive agreements, which, although recognizing the lack of power in the U.S. to determine the level of rates, nevertheless affirm the power to remove unlawful

---

[16] Sec. 6, Chicago Convention, 61 Stat. 1180. (App. 140a)

[17] 60 Stat, 1499, TIAS 253, sets out the Bermuda bilateral agreement which is the pattern for subsequent air transport bilaterals.

discrimination and prejudice.[18] The construction and application of traditional statutory language barring unlawful discrimination, preference and prejudice to the new mode of air transportation of cargo should be reviewed by this court.

While the volume of transatlantic air cargo is not as large as cargo moving on the surface, it has grown more than ten-fold between 1960 and 1973 from 46,129 tons (92,258,000 lbs.) to 505,181 tons, (1,010,362,000 lbs.) and will become increasingly important as the size of aircraft increases and the flying costs per ton mile decrease. Shippers, manufacturers and consumers will be affected in their choices of location and distribution if a cargo rate structure gives New York a lower rate to Europe than Dulles because New York has a slight distance advantage, but denies to Dulles a similar rate advantage to Central and South American ports when the tables are turned. Such a result seriously affects the economic development of the Commonwealth of Virginia and other states similarly situated. It would affect the investment by a state in airports such as Dulles as it restricts the competitive opportunities available to Dulles and becomes a critical issue in the plans of the Commonwealth.

---

[18] The difficulty of regulating the *level* of international rates and fares has been recognized but it has generally been contended or assumed that the United States has power to prevent discriminatory rates. Note: "Rate Regulation In Ocean Shipping," 78 HLR 635 (1965).

CONCLUSION

For all of the foregoing reasons it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the Fourth Circuit herein.

ANDREW P. MILLER,
Attorney General of Virginia,
1100 East Broad Street,
Richmond, Virginia 23219

HENRY M. MASSIE, JR.,
Assistant Attorney General,
1100 East Broad Street,
Richmond, Virginia 23219

PAUL REIBER,
1625 Eye Street, N.W.,
Washington, D.C. 20006

Of Counsel:

HERMAN F. SCHEURER JR.
SHANLEY AND FISHER
1 Farragut Sq. South
Washington, D.C. 20006

Of Counsel for
METROPOLITAN WASHINGTON BOARD OF TRADE

September 4, 1974